Supreme Court, U.S.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

TONY DAVIS BALLARD

Petitioner

VERSUS

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state civil deposition given by petitioner, who reserved his rights to impose objections at any trial, can be used against him at his federal criminal trial when he imposed the Amendment V privilege against self-incrimination under the circumstances?

2. Whether a state civil deposition given by petitioner, who asserted his rights against self-incrimination under Amendment V of the Constitution, can have that deposition entered against him as an admission and then be used in the nature of a confession whereby one United States Attorney took the stand at Ballard's criminal trial and read selected answers from this deposition posed by another prosecutor during his criminal trial?

3. Whether the trial court violated petitioner's attorney-client privilege by allowing his attorney, a civil defendant being sued in state court by Ballard, to testify at his criminal trial ruling the civil suit filed was a waiver of this privilege. The United States Court of Appeals for the Fifth Circuit ruled this a wrongful decision based on this waiver, but allowed the attorney's testimony to stand under the crime-fraud exception wrongly applying the facts of this case in finding Ballard sought legal advice on how to violate the law.

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PETITION FOR CERTIORARI

Petitioner, Tony Davis Ballard, now prays that a writ of certiorari be issued to review the criminal judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered upon him in this criminal appeal, which he timely petitioned both the panel and the court in banc to rehear and which was denied February 5, 1986.

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been reported in the supplements to the Federal Reporter, Second Edition, and is located at

779 F.2d 287 (5 Cir. 1985). This Opinion is in Appendix A. The opinions of the United States District Court ruling upon the attorney-client privilege and other matter is unreported and is found in the transcript of the criminal trial as part of the record of appeal before the Fifth Circuit.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 3, 1986. Timely petitions for this rehearing were filed and were denied on February 5, 1986. This petition for certiorari for this federal criminal appeal was filed within 30 days thereof as allowed under 18 U.S.C. § 3372, and of the Rules of Appeal for this Supreme Court, Rule 22(2). This appeal is based on petitioner's prosecution and conviction under the federal criminal statute 18 U.S.C. § 152, whereby he was convicted of making false statements on his bankruptcy petition filed in 1980.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offenses to be twice put in jeopardy of life and limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

The Mississippi Code Annotated on discovery selected parts thereof and Federal Rules of Evidence, 801(d)(2)

included in the Appendix for reference along with the Stipulation made at the oral deposition of petitioner.

STATEMENT OF THE CASE

The certiorari involves the impact of modern civil litigational discovery upon the Fifth Amendment privilege against self-incrimination. Petitioner's civil deposition was allowed to be used against him at his criminal trial despite his objections.

This deposition was taken in a civil suit where Ballard reserved his right to later impose objections for any use thereof at trial. This deposition was taken not to preserve testimony for trial; but rather for discovery purposes only. Based on this deposition, petitioner was indicted and placed on trial for two violations of 18 U.S.C. § 152 for making false statements in his Chapter 7 bankruptcy petition.

The deposition was allowed into evidence under Rule 801(d)(2) Federal Rule of Evidence as an admission by a party-opponent; and then allowed to be used in such a way that prejudiced petitioner's right against being made to become a witness against himself. At his criminal trial an Assistant United States Attorney was allowed to take the witness stand before the trial jury assuming the role of Ballard during the prosecution's case-in-chief. Another Assistant United States Attorney then posed selected questions taken from petitioner's civil deposition to the surrogate defendant Ballard receiving those answers set out in that document.

This conduct violated the protections of this privilege against self-incrimination in three ways. First, as covered in Point 1, petitioner's general rights under the Fifth Amendment were violated when the deposition was allowed into evidence. Second, as set out in Point 2, Ballard's right not to appear as a witness against himself was ignored by the method the deposition was

used at the criminal trial. Third, and not delineated here for brevity, petitioner's rights not to have the prosecution comment on his silence at this trial was destroyed by a method that made a shambles out of any trial tactics he might have used when he appeared being represented by one prosecutor acting as Ballard in the deposition thus forcing Ballard to take the witness stand himself later in trial.

This third point is telling upon Ballard's defenses when he was refused the right to open the area of possible prosecutorial misconduct as involved in this rather unique case involving his indictment and other conduct. This destroyed much of his planned defenses.

The final point for certiorari evolves around the attorney-client privilege. Petitioner's attorney, Ron Smith, was allowed to testify against Ballard because of a civil suit Ballard had filed against Smith based on this individual's past legal and fiduciary conduct.

The government's whole case was based on using this civil deposition against Ballard as if it were an actual confession going so far as to find a substitute for the defendant; and of using petitioner's attorney to testify against him at the trial despite the privilege and the motive Smith had to harm Ballard as much as possible thus aiding his defenses in the civil action.

To fully understand this request for certiorari it is necessary to set out the background leading up to petitioner's criminal indictment, trial, and conviction for making false statements on his bankruptcy petition filed in 1980.

Petitioner was involved in a wholesale and retail concern he owned entitled "Tony's Auto Parts" during the 1970's. As part of his business, he sought the aid of an attorney licensed in Mississippi to help him with his business and legal problems. This attorney, Ron Smith,

abused his fiduciary and legal relationships with petitioner to profit from his mismanagement of this company. Smith induced Ballard to take out loans to be secured by inventory and real property. Smith caused this company to suffer financially by his conduct. When this company got into financial trouble, Smith offered to buy in to this company by paying a large sum of cash. To protect his interests, Smith insisted on formally incorporating the company and making himself and his legal secretary officers therein and receiving control over finances.

The corporation was never fully formed and Smith never paid the sum promised. Smith took financial control of the company. He used his fiduciary position to profit while allowing the company and petitioner to gradually face bankruptcy by his active mismanagement. Smith wrongly advised petitioner that a financial institution was foreclosing because the loan Smith had induced Ballard to obtain could not be paid as agreed. There was sufficient funds in the company to meet and pay these notes, taxes, and other costs. Smith hid this financial solvency from Ballard making him feel that to avoid foreclosure he had to follow Smith's advise and to act as quickly as possible. The banking institution was not intending to foreclosure. Smith kept this information from Ballard.

Smith induced Ballard to allow the banks to assign their loans to a co-signer Bernard P. Wood of Ballard's notes. Then Wood, upon reimbursing the bank, foreclosed on Ballard's shop, fixtures, and inventory. Wood wrongfully profited by this conduct by taking fixtures not part of the loan security; by taking inventory far in excess of the value of the loan and refusing to account to Ballard; and failed to provide petitioner with those funds in excess of the loan payment made to the bank. This placed Ballard at the mercy of creditors demanding

payments of debts owing them. Petitioner, after foreclosure, had no business with which to generate funds to pay these creditors. His only option, advised Smith, was bankruptcy.

Smith took from the company what little capital was left by acquiring over $9,000 in cash for himself without informing Ballard. Smith also advised Ballard how to use his real property pledged as loan security to avoid bankruptcy claims and tax liens thereon. Smith advised Ballard to dispose of this real property so Smith's legal fees claimed owing him from petitioner could be paid. Smith advised petitioner how he could keep the cash received from the sale of this real property so it would pass outside of the bankruptcy estate. Petitioner followed Smith's advice.

Petitioner took the real property used to secure his loan and transferred it to Ron Smith as advised. Petitioner's father-in-law purchased this land from Smith for $14,000. Smith kept $4,000 for his legal fees and gave $10,000 to petitioner's wife advising her to open a safe deposit box and keep the funds there as they would be outside the bankruptcy estate. Ballard alleges Smith later took $1,000 from this safe fund as a fee to file petitioner's bankruptcy.

Creditors were hounding Ballard day and night. He sought to get Smith to file the bankruptcy as promised. Smith acted to ward off these creditors but refused to file the bankruptcy forcing Ballard to seek other legal counsel. This attorney was the first of three who would represent Ballard in his Chapter 7 bankruptcy.

Ballard went to his first new attorney, Gid Montjoy, who obtained information from petitioner, and obtained financial records of Ballard and of the corporation from Ron Smith. Montjoy then had his legal secretary type the bankruptcy petition and advised Ballard to come to his office and sign the same. Petitioner, without reading

this petition, and without having Montjoy advise him at that time, signed the bankruptcy petition that was to become the basis for his federal criminal trial.

The bankruptcy petition stated Ballard had not sold real property within the last year. Petitioner filed this bankruptcy petition on July 8, 1980, and had transferred his real property to Smith on August 14, 1979, thereby missing the year by 26 days. Ballard also signed the petition stating he had not the use of a safe deposit box. Such a safe deposit box was under the control of his wife. Ballard alleges this safe deposit box had been set up as advised by Smith. Ballard stated he had advised Montjoy of all of this. Montjoy shortly thereafter joined the Episcopal Priesthood forcing Ballard to go to a second bankruptcy attorney.

This second attorney later placed petitioner with a third bankruptcy attorney under which his Chapter 7 bankruptcy case was ordered closed and discharged between May 28, 1981, and June 9, 1981.

Ballard later realized how he had been cheated. He filed a civil suit in the Circuit Court of Hinds County, Mississippi against Smith and Wood. In this suit, petitioner, as plaintiff, alleged legal malpractice against Smith as part of his cause of action. This civil suit was filed on May 21, 1982, some 13 months after his Chapter 7 bankruptcy case had been ordered closed and the no asset estate discharged by the bankruptcy court.

Civil defendant Ron Smith, with Wood, acted to take plaintiff's civil deposition under Mississippi statute and rules governing discovery. During three days in August (16, 17, and 18) 1982. Ballard was deposed.

During this deposition Ballard, by stipulation as is the custom in Mississippi, reserved all objections in this deposition except as to the form of the question for assertion at his trial. During this time, Ballard had no idea he was under any criminal investigation. On July

20, 1982, Ballard's old bankruptcy case was reopened under 11 U.S.C. § 350 because the bankruptcy court ruled it had inadvertently closed the estate; and because the Trustee had failed to properly account for some $6,000 he had obtained from Ron Smith of the $9000 taken by Smith from Ballard's auto parts company. This $6,000 obtained by the Bankruptcy Trustee was the amount Smith could not justify in paying debts owing by that auto parts company to this Trustee.

This reopening was done without notice to Ballard or opportunity for him to appear and oppose this action. On the basis of this reopening, Ron Smith as a civil defendant, moved the bankruptcy court to remove the civil action from the state to the federal bankruptcy court. This was approved and the civil suit ordered removed. Ballard again was given no notice of or opportunity to oppose this removal. This halted progress on the civil suit as discovery was later ordered stayed by the bankruptcy court preventing Ballard from obtaining any information.

This removed civil suit now rests pending a complex appeal to the United States Court of Appeals for the Fifth Circuit concerning this unwarranted removal as an abuse of bankruptcy statutes, authority, and jurisdiction, under a petition for mandamus thereon to compel remand to the state court of the civil suit.

Shortly after Ballard gave his three day civil deposition, he was indicted by the United States Attorney for making false statements in his bankruptcy petition in violation of 18 U.S.C. § 152. It is felt this civil deposition was the sole basis of this indictment, and no investigation of this matter was undertaken by any federal authority.

Ballard was placed on trial in the federal court almost five years after he filed his bankruptcy petition for making false statement therein in violation of 18 U.S.C.

§ 152. Ballard raised his fifth amendment privilege against self-incrimination at the time of his criminal trial objecting to the use of the civil deposition. The trial judge allowed the deposition to be admitted and to be selectively read to the trial jury during the prosecution's case-in-chief. This civil deposition was presented to the jury by allowing one prosecutor to take the stand as if he was Ballard while another prosecutor read selected questions and received answers read from that civil deposition.

Ron Smith was allowed to testify against petitioner at this criminal trial despite Ballard's objection that this violated the attorney-client privilege. The trial court ruled that Ballard had waived his attorney-client privilege when he filed his civil suit against Smith in state court. The United States Court of Appeals for the Fifth Circuit decided this method was not sufficient to allow a ruling of waiver of the attorney-client privilege. However, this same appeals court allowed Smith's testimony to stand because of the crime-fraud exception claiming the record showed Ballard had sought Smith's legal advice to commit the crime he was accused. The appeal record only shows Ballard failed to heed the advice of Ron Smith to delay filing bankruptcy, and not that he sought that legal advice as a way to violate the law.

Petitioner was found guilty by a jury of violating 18 U.S.C. § 152 by making two false statements in his bankruptcy petition. From this, Ballard appealed to the United States Court of Appeals for the Fifth Circuit which was denied. Petitioner now petitions the United States Supreme Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. WHETHER THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION CAN BE RESERVED IN A CIVIL DEPOSITION AND LATER IMPOSED AT THE TIME OF A FEDERAL CRIMINAL TRIAL.

The following stipulation was made in Ballard's civil deposition: "All objections, except as to the form of the question, will be reserved until such time as this deposition is attempted to be used for purpose of trial." This Stipulation is found in Appendix B attached. At the time petitioner gave this deposition, he had no knowledge he had violated any criminal statute or that he was a subject of any criminal investigation.

The State of Mississippi, both by statute and rule governing discovery, imposes an obligation on a party to a civil suit to provide discovery. These state statutes and rules follow the federal rules of discovery accepted in 1938. Mississippi did not accept such discovery by statute until 1976 and by rules of procedure accepted in 1982. All of this was done some 190 years after the Congress adopted and the people ratified the Bill of Rights which included the Fifth Amendment privilege against self-incrimination that covers all criminal trials. In contrast, civil litigation imposes a duty upon a party to provide discovery to include civil depositions. Ballard, at his civil deposition, *reserved his right* to later impose objections to the use of his civil deposition at his trial. (Emphasis added) This is the custom in this state as there is usually no judicial officer present at depositions authorized to or skilled enough to rule on objections.

In fact, Mississippi Code Annotated 1972 (MCA) § 13-1-230(c) entitled "Depositions upon oral examination; Objections" states (See Appendix C), "All objections made at the time of the examination ... to the evidence

presented ... and any other objection to the proceeding, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections." Further, MCA § 13-1-232(b) (See Appendix D) entitled "Use of depositions in court proceeding: Objections to admissibility" allows for the use of objections "at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of evidence if the witness were then present and testifying."

Mississippi, by custom and statute, has provided for the reservation of objections in oral depositions for use at the time of the trial. Petitioner *did reserve* and later impose the Fifth Amendment objection based on that privilege given him to avoid being forced to incriminate himself at the time of his criminal trial as is allowed under Mississippi discovery statutes. The United Stated Circuit Court of Appeals for the Fifth Circuit ignored these statutory rights when it denied his appeal.

Ballard timely imposed his Fifth Amendment privilege at his criminal trial for the use of his civil deposition. This privilege should be honored under the language of the Fifth Amendment that states, "No person ... shall be compelled to be a witness against himself..."

This privilege against self-incrimination should not be based on a custodial situation because our history of liberty has been a history of the observation of procedural safeguards. *McNabb v. U.S.*, 318 U.S. 332 at 347 (1943). This privilege should vest when Ballard reserved by stipulation his objections at the civil deposition and when he later imposed that objection at the time of his criminal trial.

McCormick states that the accused has a right not only to avoid giving incriminating responses to inquiries, but to be free from such inquiries themselves which includes a right not to be called as a witness at his own

trial. *McCormick on Evidence*, Section 130 (2d. Edition, 1972). The government has found a way around the privilege against self-incrimination by this procedure.

The constitutional privilege was not intended to be based on procedural techniqualities as custodial situations, knowledge of possible criminal investigation or involvement of governmental compulsion to force testimony. This privilege is a blanket that protects petitioner and should be liberally applied to insure the constitutional privilege against self-incrimination is applied properly. Procedural safeguards are not themselves rights protected by the Constitution, but they are methods or measures to insure those rights against compulsory self-incrimination. *Michigan v. Tucker* 417 U.S. 433 (1974)

Our courts confuse the methods or measures set out in *Miranda v. Arizona*, 334 U.S. 436 (1966) as the constitutional standard to be protected and used to judge when this privilege is involved. Such extra-constitutional procedural measures, when used to trigger this privilege, destroy the privilege in Ballard's situation.

The trial court allowed the oral deposition to be admitted under Rule 801(d)(2) of the Federal Rules (Statutes) of Evidence as an admission by a party-opponent. This decision by this appeals court subordinates a constitutional privilege to a federal statute thereby allowing a prosecutor to circumvent constitutional safeguards.

Such are the reasons why this court should grant this certiorari. As "Miranda Rights" fade, they should not be allowed to develop a nexus between procedural methods designed to protect a individual in a custodial situation and the privilege against self-incrimination. The privilege should stand on its own against convenience; against Federal Rules (Statutes) of Evidence; and against such other techniques that tend to erode this

right. This criminal matter involves whether an individual can reserve his rights and privileges given him for criminal prosecution in civil litigation where discovery is commonly used. Two judicial systems, one civil and the other criminal, are now placed in direct conflict with a constitutional privilege.

2. THE TRIAL COURT ALLOWED THE DEPOSITION TO BE ENTERED AS AN ADMISSION AND THEN ALLOWED IT TO BE WRONGLY USED AS A CONFESSION AT PETITIONER'S CRIMINAL TRIAL

The trial court allowed petitioner's civil deposition to be admitted at his trail over his Fifth Amendment privilege as an admission against self-interest. This trial court was in error allowing this civil deposition to then be used as if it was a confession by allowing one prosecutor to take the witness stand before the trial jury as if he were the defendant Ballard and answer selected questions posed by another prosecutor during the prosecution's case-in-chief. This was a major part of the prosecution's case-in-chief, the second being Smith's testimony as Ballard's attorney. This violated the constitutional mandate in the Fifth Amendment by using this method to allow the prosecution to present Ballard as a witness against himself.

This violated Mississippi statute and rules governing how a civil deposition taken for discovery can be used at any trial. Mississippi, unlike the federal court, has statutes governing civil discovery to include sanctions on failure to participate. Mississippi, like the federal discovery rules, protects an individual as to how a civil deposition for discovery may be used at any trial.

Valid use of this civil deposition of petitioner's criminal trial is imposed by such civil statutes and rules

governing this action as well as by the Fifth Amendment. Only if Ballard took the stand himself and made statements different from or in contradiction of that in his oral deposition could the prosecution then use this deposition as a way to impeach Ballard under statutes governing the use of civil depositions as involved. Such is the intended method of use of a civil deposition taken only for discovery.

To allow such use as by the federal prosecutors would distort the intent of the Congress in including criminal prosecution in the Fifth Amendment privilege against self-incrimination; would distort the state statutes and rules governing civil discovery; and would distort this privilege against self-incrimination itself by allowing a defendant to be made a witness against himself indirectly.

The Congress, when it submitted this Fifth Amendment language as part of the Bill of Rights, intended this privilege cover all criminal trials whether inquisitorial or accusatorial. This language in the Fifth Amendment was ratified by the people. *The Constitution of the United States: Analysis and Interpretation*, U.S. Government Printing Office, Congressional Research (1983), pages 1106-1114. Neither the Congress nor the people intended for this method of use by the prosecutor to become an exception to this vital privilege.

The way Ballard's civil deposition was used violated his right to choose not to testify at his criminal trial as guaranteed by the Constitution. By allowing one prosecutor to take the witness stand before the trial jury posing as Ballard during the prosecution's case-in-chief placed Ballard on the stand as a witness against himself. This conduct stripped Ballard of his right to remain silent if he should decide not to testify as guaranteed to him by the Constitution. Ballard's deposition was presented to the trial jury as "theater" complete with script and actor.

If petitioner's deposition were to be allowed entered in his criminal trial, for whatever reason, its use should have been limited to impeaching him only if he chose to take the witness stand. *Smith v. U.S.*, (D.C. Cir. 1962), 312 F.2d 867; *Walder v. U.S*, 347 U.S. 62 (1954).

This certiorari should be granted because the way this civil deposition was used presented Ballard to the trial jury by using an actor in his place thus destroying the right not to be forced to be a witness against himself; and also destroying any tactical decision whether petitioner should take the stand or not at this criminal trial. By presenting Ballard as a witness against himself through a substitute forced Ballard to take the stand and testify himself during his defense case-in-chief.

3. PETITIONER'S ATTORNEY-CLIENT PRIVILEGE WAS VIOLATED BY BOTH THE TRIAL AND INITIAL APPEALS COURT CONDUCT

The trial court ruled Ballard had waived his attorney-client privilege when he filed his state civil suit against Ron Smith alleging legal malpractice. On the basis of this, Smith was allowed to testify against Ballard despite the motive of this attorney to do his ex-client as much harm as possible because of the pending civil suit against Smith. The Fifth Circuit ruled that this type of waiver was wrong; however, that appeals court, without justification, invoked the crime-fraud exception to allow Smith's testimony to stand.

Ballard had Smith voir dired prior to his testimony. The jury was out and this voir dire provided no basis for any crime-fraud exception, and only established that Ballard was Smith's legal client, and failed to follow Smith's legal advice if actually given as set out in the transcript. This trial transcript is too long and too broken up to attempt to attach selections in the appendix.

At that time Ballard trusted his attorney Ron Smith and was seeking advice and aid on filing a bankruptcy this attorney had recommended as a way out of the financial situation facing petitioner. Ballard sought and used the legal advice given him by Smith for valid and legal reasons. The record does not show that Ballard contemplated any crime with this attorney as required for this crime-fraud exception. *Grand Jury Proceedings v. Jones*, 517 F.2d 666 (5CA 1975).

Ballard had another attorney file his bankruptcy. This attorney, Gid Montjoy, was leaving the legal profession for the priesthood. Ballard informed him of what Smith had advised him to do as to the real property and as to the safe deposit box. Montjoy contacted Smith and received the financial records under Smith's control before he had Ballard sign the bankruptcy petition. At the trial, Montjoy's memory had faded with the passage of time since 1980 events.

Mississippi Code Annotated 1972 § 73-3-37(4) requires an attorney "To maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients." The United States Court of Appeals for the Fifth Circuit has decided that an attorney for a former client should maintain the attorney-client privilege except in the most extraordinary circumstances; and the mere appearance of an attorney to testify against a former client should only be allowed in rare instances. *U.S. v. Cochran*, (5 Cir. 1977), 546 F.2d 27, 29.

This certiorari should be granted because petitioner's attorney was allowed to testify against him under the crime-fraud exception to this privilege whereby Ballard's lack of knowledge of the complex field of bankruptcy law has been turned from that of a client seeking legal advice, weighing options, and shaping the estate for bankruptcy, to that of a master criminal seeking ways to defraud the government. All this based on the advice of

his attorney now being sued for legal and fiduciary malpractice. This allowance, combined with the inability of petitioner to use prosecutorial misconduct, insured his conviction in an unfair trial.

Further, this certiorari should be granted because his due process rights under the Fifth Amendment were denied him under the procedures used and the rulings made that allowed his past attorney Ron Smith to testify against him at this criminal trial under these circumstances.

CONCLUSION

For the reasons stated, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this criminal matter.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

March ____, 1986

CERTIFICATE OF SERVICE

The undersigned certifies that on the date set forth hereinafter, three copies of this Petition for Certiorari were mailed, postage prepaid, to:

George Phillips, Esquire
United States Attorney
Southern District of Mississippi
Post Office 2901
Jackson, Mississippi 39205

I further certify that all parties require to be served have been served. Dated: March ____, 1986

DIXON L. PYLES

APPENDIX A

(Footnotes at end of Appendix)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-4145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY DAVIS BALLARD,

Defendant-Appellant.

Appeal from the

United States District Court

for the Southern District of Mississippi

(January 3, 1986)

Before GEE, RUBIN, AND DAVIS,

Circuit Judges.

RUBIN, Circuit Judge:

The defendant was found guilty of making false statements in his petition for bankruptcy. He attacks his conviction on a number of grounds, including the admission in his criminal trial of his former lawyer's testimony concerning alleged privileged conversations between him and his erstwhile counsel. Confidential communications from a client to a lawyer for the purpose

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RUBIN, Circuit Judge:

The defendant was found guilty of making false statements in his petition for bankruptcy. He attacks his conviction on a number of grounds, including the admission in his criminal trial of his former lawyer's testimony concerning alleged privileged conversations between him and his erstwhile counsel. Confidential communications from a client to a lawyer for the purpose

of obtaining legal advice and the lawyer's responses to those inquiries are privileged. If, however, the client seeks legal advice for the purpose of being assisted or guided in the commission of a crime or the perpetration of a fraud, the communication is not sheltered. We conclude that the client was engaged in a continuing fraudulent or criminal activity, sought the lawyer's advice for the purpose of furthering that wrongful activity, and utilized that advice to commit a crime. For these reasons, we hold that the lawyer's testimony was properly admitted. We reject, however, the government's contention that, because the client had sued the former lawyer for malpractice relating to services concerned with filing the bankruptcy petition, the client waived any privilege that might otherwise have applied.

Finding all the other arguments for reversal of his conviction to be without merit, we affirm.

I.

Tony Ballard operated an auto parts business in Jackson, Mississippi. His lawyer and sometime business associate at the time was Ron Smith. In August 1979, Ballard deeded nine acres in Madison County, Mississippi, to Smith, who in turn deeded the property to Ballard's father-in-law. Though the facts are contested, it appears that Ballard's father-in-law gave Smith a check for $14,000. The check was cashed; Smith kept $4,000, an amount he said represented legal fees due him, and gave the remaining $10,000 to Mrs. Ballard, who obtained a safe deposit box and put the money in the box.

Ballard contends he entered into this transaction both to pay legal fees to Smith and "so a tax lien could be avoided on this land when bankruptcy was filed." The jury might reasonably have concluded from Smith's testimony that the purpose of the transaction was to

conceal some of Ballard's assets from his creditors, and, indeed, Ballard's position asserts the purpose at least of hiding his assets from the tax collector.

Ballard contends that a month later, in September, he paid Smith a fee of $1000 to file a bankruptcy petition, but that Smith later refused to represent him. Ballard then retained another lawyer who, on July 8, 1980, filed a bankruptcy petition on Ballard's behalf in the Southern District of Mississippi. Approximately a year later, Ballard's debts were discharged in bankruptcy and the bankruptcy estate was closed.

In 1982, Ballard filed a civil suit against Smith and one of Ballard's former business associates, claiming, *inter alia*, that Smith was guilty of legal malpractice because he had failed to file the bankruptcy proceedings for which he had allegedly been retained. Ballard's deposition was taken in the civil suit, but the case had not yet been tried when, in 1984, Ballard was indicted for making false statements in his bankruptcy petition in violation of 18 U.S.C. § 152. In his bankruptcy petition, Ballard had stated that he had made no transfer of real property within one year preceding the filing of the petition and that he did not have a safe deposit box. In fact, the evidence established that Ballard had transferred the nine-acre tract to Smith, his attorney, and had access to his wife's safe deposit box obtained in his wife's name.

Ballard asserts that, in the criminal trial, the district court erred (1) in permitting the deposition taken from him in his civil suit against Smith to be introduced in evidence, in violation of his privilege against self-incrimination; (2) in permitting Smith to testify about Ballard's communications with Smith and Smith's responses, in violation of the attorney-client privilege; (3) in failing to dismiss the indictment because of the delay

in prosecution; (4) in refusing to allow Ballard to introduce evidence of prosecutorial misconduct, in violation of his due process right; and (5) in refusing to give jury instructions requested by Ballard. We discuss Ballard's contentions in the order he chose to present them, which presumably reflects their relative strength in his eyes.

II.

Ballard's testimony in his civil deposition was admitted as an admission by a party-opponent pursuant to Federal Rule of Evidence 801(d)(1).[1] There is not the slightest suggestion in the record that this testimony was involuntary or that Ballard refused to testify on the basis of self-incrimination. The trial court did not abuse its discretion in admitting the civil deposition.[2] Extra-judicial admissions, voluntarily made, are admissible in evidence[3] Their admissibility is not altered by their utterance under oath during the course of the civil proceedings.[4]

The argument that the defendants in the civil suit fraudulently induced Ballard to make these statements lacks any support in the record. Furthermore, any "impropriety in the taking of [a] deposition[] will authorize [its] suppression under the fifth amendment if and only if such conduct may be imputed to the government."[5] The record here lacks any evidence to support a contention that the government was involved in any way in the taking of Ballard's civil deposition. Ballard instituted the civil action voluntarily. Although his deposition was sought by the defendants, his giving it was an essential step in prosecution of his civil suit. The charge that Smith and Smith's counsel in the civil case acted fraudulently and in a manner improper for officers of the court are, so are as basis in the record can be discerned, but constructs of counsel's imagination in preparing an appellate brief.

Further, Ballard's ignorance at the time of taking of his deposition that he might later be charged with a crime is inconsequential. Neither due process nor any procedural rule requires the suppression of a voluntary admission that later proves to be a link in proof of criminality.[6]

III.

The district court admitted the testimony of Ballard's former lawyer, Ron Smith, on the basis that Ballard, by suing Smith for malpractice, waived any privilege shielding his communications with Smith. The government argued on appeal that, because Ballard's malpractice suit against Smith "arose from the same transactions" that comprised the basis of the criminal suit against Ballard, the waiver of the privilege should extend to the criminal trial. We do not agree. A lawyer may reveal otherwise privileged communications from his clients in order to recover a fee due him, or to defend himself against charges of improper conduct, without violating the ethical rules of confidentiality[7] or the attorney-client privilege.[8] The mere institution of suit against a lawyer, however, is not a waiver of the privilege for all subsequent proceedings, however unrelated.

The conversations between Ballard and Smith, however, were admissible for a different reason. Some time after Ballard's nine acres had been transferred to his father-in-law and the cash had been put in Mrs. Ballard's safe deposit box, Ballard came to Smith's office and asked Smith to file a bankruptcy petition. As Smith testified in the criminal trial, Smith had "explained to Ballard that if a petition was filed on his behalf, that there was a question about transferring of property within one year, and that this transfer from him to me, and then from me to his father-in-law, would

have to be disclosed on that petition and chances were that it would relate back to — go back to bankruptcy court as part of the assets of the estate."

Later, according to Smith's testimony, Ballard returned and told Smith that his creditors were pressing him. Smith told Ballard he would "have to disclose this property transfer if he filed within one year." Smith asked Ballard "to wait, told him to wait, and he said he would." Subsequently, Ballard retained another lawyer who asked Smith to deliver Ballard's files to him. Smith complied. Thereafter Ballard, represented by this second counsel, filed the bankruptcy petition in which the assets mentioned by Smith were not disclosed.

Privileges are recognized because law-makers and courts consider protecting confidential relationships more important to society then ferreting out what was said within the relationship. The privilege for communications between client and attorney ceases when the purpose of the privilege is abused, when the lawyer becomes either the accomplice or the unwitting tool in a continuing or planned wrongful act.

A half century ago, Justice Cardozo wrote: "The [attorney-client] privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."[9] The admissibility of the evidence does not turn on the lawyer's complicity in the wrongful transaction: "The attorney may be innocent, and still the guilty client must let the truth come out."[10] Once the party seeking disclosure makes a prima facie case that the attorney-client relationship was used to promote an intended criminal activity, the confidences within the relationship are no longer shielded.[11] These precepts have since been applied consistently and have come to be known as the crime or fraud exception to the attorney-client privilege.[12]

Taking either Ballard's or Smith's version of events, a prima facie case of intended illegality is apparent. The conveyance of Ballard's property to Smith and the delivery of part of the money received from Ballard's father-in-law to Ballard's wife were part of a fraudulent scheme to conceal Ballard's property, either from the tax collector or from Ballard's other creditors or both. The later conversations between Smith and Ballard relative to bankruptcy were a continuation of that illicit plan to conceal the assets from the bankruptcy court and the persons who were Ballard's creditors when the petition was filed. Smith's refusal to proceed and Smith's advice concerning the illegality of the plan were presumably the reasons Ballard sought other counsel.

We need not concern ourselves with whether Smith would have been required by the Model Code of Professional Responsibility[13] or the recently adopted Model Rules of Professional Conduct[14] not to reveal the property transaction and his conversations with Ballard on the basis that they were confidences and secrets of his client. The attorney-client privilege exists apart from, and is not coextensive with, the ethical confidentiality precepts.[15]

IV.

Ballard sixth amendment right to a speedy trial and his fifth amendment right to due process were not violated as a result of the four-year lapse of time between his commission of the offense and his indictment.

Although the sixth amendment right to a speedy trial applies only to post-indictment delay, the Supreme Court has held that the due process clause of the fifth amendment protects an accused to some extent against oppressive pre-indictment delay.[16] In the recent case of United States v. Amuny,[17] we held that in order to show a denial of due process with respect to pre-indictment delay, the defendant must establish that "(1) the

prosecutor intentionally delayed indicting him to gain a tactical advantage *and* (2) the defendant incurred actual prejudice as a result of the delay."[18] The burden of proving both these factors rests on the defendant.[19]

Ballard has shown no prejudice as a result of the delay, and, absent such prejudice, the constitutional claim must fail. Though Ballard has vaguely alleged some questionable motive behind the government's pre-indictment delay, he has not alleged any prejudice save the possibility that the memory of witnesses had dimmed and evidence had been lost. Ballard has not alleged any specific untoward tactical maneuvers on the prosecutor's part, nor has he pointed to any lost evidence or witnesses with faded memories.

In United States v. Edwards,[20] we stated: "In order to prejudice the defense to the extent necessary to constitute a speedy trial violation, the faded memory must substantially relate to a material fact in issue .... Vague assertions of faded memory will not suffice."[21] This statement applied equally to due process claims concerned with an alleged unconstitutional preindictment delay.[22] Actual prejudice with respect to a material fact must be shown. It has not been demonstrated here.

Ballard's companion claim is that the Speedy Trial Act[23] was violated because 105 days elapsed between filing of the indictment and the beginning of trial. The defendant's calculations are, however, in error. The speedy trial period does not begin to run until the filing of the indictment or the initial appearance of the defendant before the magistrate, whichever occurs later.[24] Any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," is excluded.[25] This automatically excludes delays resulting from pretrial discovery motions.[26]

Ballard initially appeared before the magistrate on September 20, 1984. Six days later, on September 26, 1984, the government filed a motion to compel reciprocal discovery. The defendant filed a discovery motion on October 10. An agreed order was entered on November 2, 1984, disposing of these motions. Included in this order was a provision to exclude an additional thirty days to allow time for the parties to comply with the order. Thirty-seven days of excludable time, therefore, lapsed between the filing of the government's motion and the entry of the order. On December 3, 1984, a continuance order was entered because of the trial judge's inability to hear the case on the scheduled trial date.[27] The trial began on January 7, 1985. Excluding only the thirty-seven days during which discovery motions were pending, the trial still began within the seventy days of nonexcludable time allowed by the Speedy Trial Act.[28] Moreover, by failing to move for dismissal prior to trial, Ballard waived his right to dismissal under the Act.[29]

V.

Ballard argues that he was prosecuted in this action as a result of his having instituted the civil suit against Smith and that the district court improperly excluded proferred evidence of prosecutorial misconduct. This claim of prosecutorial misconduct in pursuing Ballard's conviction was not asserted until after the beginning of the trial. Rule 12(b)(1) of the Federal Rules of Criminal Procedure requires "[d]efenses and objections based on defects in the institution of the prosecution" to be made before trial.

Moreover, Ballard contends on appeal that "[t]he record of the chronology of litigation of the civil and criminal cases stands as actual proof of prosecutorial misconduct." This statement is based only on propensity for wishful thinking. A decision to prosecute is within

the United States Attorney's substantial discretion and is generally not subject to judicial review absent a strong showing of actual vindictiveness[30] or an equal protection violation.[31] Ballard made no such showing.

VI.

Ballard made post-trial motions to set aside the verdict of guilty and to enter a judgment of acquittal on the ground that there had been violations of the grand and petit jury selection process. Assuming any merit to the charges, which is at best doubtful, these issues were again raised too late. Rule 12(b)(2) of the Federal Rules of Criminal Procedure requires that objections to such matter as the grand and petit jury arrays must be raised by motion before trial. Failure to do so constitutes a waiver of the claim.[32] In addition, under 28 U.S.C. § 1867(a), a defendant in a criminal case may move to dismiss the indictment on the grounds of improper statutory grand and petit jury selection "before the voir dire examination begins, within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the ground therefor." Failure to act timely waives the objection.[33]

VII.

The charge that 18 U.S.C. § 152 is unconstitutional for vagueness is, like the other argument that remain to be addressed, spun out of the cloth of last resort. The statute provide, "[w]hoever knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11" shall be guilty of an offense against the United States. No contrivance exposes a lack of clarity in the statute or a lack of certainty that it proscribes the making of false oaths in relation to a bankruptcy matter.

The defendant also argues the trial court erred in failing to grant a new trial because of various alleged

errors committed during trial. These errors concern evidentiary rulings, the denial of the motion of judgment of acquittal, the granting and refusal of various instructions, the denial of the motion for a mistrial, and, with enigmatic obscurity, "such other matters as are of record."

Because Ballard has offered only a bare listing of alleged grounds for new trial, without citing supporting authorities or references to the record, these claims are considered abandoned on appeal.[34] Notice pleading does not suffice for appellate briefs.

Other arguments flung at the court at random in Ballard's brief are similarly lacking in merit.

For these reasons, the judgment is AFFIRMED.

APPENDIX A
FOOTNOTES

[1] Fed. R. Evid. 801(d)(2) provides: "A statement is not hearsay if ... [it] is offered against a party and is ... his own statement, in either his individual or representative capacity ...."

[2] *See* United States v. Reed, 715 F.2d 870, 875 (5th Cir. 1983).

[3] *See* United States v. Meyer, 733 F.2d 362, 363 (5th Cir. 1984); United States v. Evans, 572 F.2d 455, 488 (5th Cir.), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978); United States v. Buttorff, 572, F.2d 619, 626 (8th Cir. 1978), *cert. denied*, 437 U.S. 906, 98 S.Ct. 3095, 57 L.Ed.2d 1136.

[4] United States v. Handley, 763 F.2d 1401, 1404-05 (11th Cir. 1985); Bass v. United States, 409 F.2d 179, 180 (5th Cir.), *cert. denied*, 396 U.S. 863, 90 S.Ct. 138, 24 L.Ed.2d 117 (1969).

[5] United States v. Handley, 763 F.2d 1401, 1405 (11th Cir. 1985) (citation omitted).

[6] *See also* United States v. Anderson, 481 F.2d 685, 696 (4th Cir. 1973); Ayers v. United States, 193 F.2d 739, 740-41 (5th Cir. 1952).

[7] Rule 1.6(b)(2) of the Model Rules of Professional Conduct provides:

> A lawyer may reveal ... information [relating to representation of the client] to the extent the lawyer reasonably believes necessary ... [t]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[8] Tasby v. United States, 504 F.2d 332, 336, (8th Cir. 1974), *cert. denied*, 419 U.S. 1125, 95 S.Ct. 811, 42 L.Ed.2d 826 (1975); Laughner v. United States, 373 F.2d 326, 327 n.1 (5th Cir. 1967); *see also* Doe v. A. Corporation, 709 F.2d 1043, 1048-49 (5th Cir. 1983).

[9] Clark v. United States, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993, _____ (1932).

[10] *Id.*

[11] *See, e.g.*, 53 S.Ct. at 470, 77 L.Ed. at _____; *see also* In re Grand Jury Proceedings in the Matter of Fine, 641 F.2d 199, 203 (5th Cir. 1981); United States v. Hodge and Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977) and cases cited therein.

[12] *See e.g.*, Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971); *In re* Grand Jury Proceedings, 680 F.2d 1026, 1028-29 (5th Cir. 1982); In re Sealed Case, 754 F.2d 395, 399, 400 (D.C. Cir. 1985). *See generally* Wigmore on Evidence, § 2298 (McNaughton rev. 1961); Bartell, *The Attorney-Client Privilege and Work Product Doctrine*, in 1 ALI/ABA, Resource Materials-Civil Practice and Litigation in Federal and State Courts 646-47 (2d ed. 1984) and extensive list of cases cited therein.

[15] *See* G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 89-90 (1985).

[16] United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752, _____ (1977); *see also* United States v. Marion, 404 U.S. 307, 324-26, 92 S.Ct. 455, 465-66, 30 L.Ed.2d 468, _____ (1971).

[17] 767 F.2d 1113 (5th Cir. 1985).

[18] *Id.* at 1119 (emphasis in original); *see also* United States v. Townley, 665 F.2d 579, 581 (5th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982); United States v. Hendricks, 661 F.2d 38, 40 (5th Cir. 1980); *cf.* Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101, _____ (1972).

[19] *Amuny*, 767 F.2d at 1119.

[20] 577 F.2d 883 (5th Cir. 1978).

[21] *Id.* at 889.

[22] *See e.g.*, United States v. Schuster, No. 84-4705, slip op. at 1357 (5th Cir. Nov. 26, 1985); United States v. Wehling, 676 F.2d 1053, 1059 (5th Cir. 1982); United States v. McGaugh, 510 F.2d 598, 604 (5th Cir. 1975).

[23] 18 U.S.C. §§ 3161-74.

[24] 18 U.S.C. § 3161(c)(1).

[25] 28 U.S.C. § 3161(h)(1)(F).

[26] United States v. Schuster, No. 84-4705, slip op. at 1350-51 (5th Cir. Nov. 26, 1985) (quoting United States v. Horton, 705 F.2d 1414, 1416 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 496 (1984); *see also* United States v. Brim, 630 F.2d 1307, 1312 (8th Cir. 1980).

[27] *See* 18 U.S.C. § 3161(h)(8)(A).

[28] *See* 18 U.S.C. § 3161(c)(1).

[29] 18 U.S.C. § 3162(a)(2) ("Failure of the defendants to move for dismissal prior to trial ... shall constitute a waiver of the right to dismissal under this section."). be made before trial.

[30] *See* Miracle v. Estelle, 592 F.2d 1269, 1275 n.11 (5th Cir. 1979); United States v. Pabian, 704 F.2d 1533, 1536-37 (5th Cir. 1983).

[31] *See* Wayte v. United States, 53 U.S.L.W. 4319, 4322 (U.S. March 19, 1985).

[32] *See* Davis v. United States, 411 U.S. 233, 241-43, 93 S.Ct. 1577, 1582-83, 36 L.Ed. 1577, ____ (1973); Talk v. United States, 509 F.2d 862, 863 (10th Cir. 1974), *cert. denied*, 421 U.S. 932, 99 S.Ct. 2479, 61 L.Ed.2d 82.

[33] United States v. Kennedy, 548 F.2d 608, 613 (5th Cir. 1977); United States v. De Alba-Conrado, 482 F.2d 1266, 1269 (5th Cir. 1973); *see also* United States v. Young, 570 F.2d 152, 153 (6th Cir. 1978).

[34] Davis v. Maggio, 706 F.2d 568, 571 (5th Cir. 1983); Fed. R.App.P. 28(a)(4).

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

TONY BALLARD — PLAINTIFF

VS. — NO. 28,681

RON C. SMITH AND

BERNARD P. WOOD — DEFENDANTS

DEPOSITION OF TONY BALLARD

APPEARANCES:

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Attorney at Law
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[APPEARING FOR THE PLAINTIFF]

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[APPEARING FOR DEFENDANT BERNARD P. WOOD]

August 16, 17 and 18, 1982
Jackson, Mississippi

ANN H. GRAY
Freelance Court Reporter
129 Cedarwood Drive
Jackson, Mississippi 39212
373-3836

STIPULATION

BY MR. MARTIN:

This is the deposition of Mr. Tony Ballard taken pursuant to notice and the Mississippi Rules of Civil Procedure. All objections, except as to the form of the question, will be reserved until such time as this deposition is attempted to be used for purposes of trial.

BY MR. MARTIN: Do you want to waive the signing?

BY MR. PYLES: No, I do not. I want him to see and sign it and make any corrections that he may wish to make. Let me ask you this: On this form of the question in here, this man is an adverse witness. You cross-examine him. The only objection I would be able to make would be the convoluted type of question. You're including that in there.

BY MR. MARTIN: Well, that's the form, but okay.

BY MR. PYLES: Okay.

— TONY BALLARD —

having been first duly sworn, testified as follows, to-wit:

EXAMINATION BY MR. MARTIN:

Q. Mr. Ballard, my name is Jim Martin and I represent Mr. Bernard Wood in this case that you have filed against him and a Mr. Ron Smith. If at any time during this deposition if I ask you something that you don't totally understand, you may ask me to rephrase it and I'll attempt to do so. This is a discovery deposition and we want you to be relaxed and we'll try to be as brief as we can.

APPENDIX C

MISSISSIPPI CODE 1972 Annotated

§ 13-1-230(c). Depositions upon oral examination.

(c) **Objections**

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

APPENDIX D

MISSISSIPPI CODE 1972 Annotated

§ 13-1-232(b) and (d)(3). Use of deposition in court proceedings.

(b) **Objections to admissibility.**

Subject to the provisions of section 13-1-228(b) and subsection (d)(3) of this section, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(d) **Effect of errors and irregularities in depositions.**

(3) **As to taking deposition.** (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if properly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under section 13-1-231 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five (5) days after service of the last questions authorized.

APPENDIX E

MISSISSIPPI CODE 1972 Annotated

§ 73-3-37(4). Duties of attorneys.

It is the duty of attorneys:

(4) To maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients.

APPENDIX F

Federal Rules of Evidence

Rule 801(d)(2): Definitions

(d) **Statements which are not hearsay.** A statement is not hearsay if —

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.